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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JAMES FONTENEAUX, PETITIONER

v.

SHELL OIL CO; SHELL INFORMATION TECHNOLOGY INTERNATIONAL INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for review is whether a Plaintiff's cause of action for denial of promotion which allege violations of 42 U.S.C. §1981, as amended by the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071, should be governed exclusively by the four-year statute of limitations under 28 U.S.C. § 1658(a).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. The opinion of the United States District Court for the Southern District of Texas is unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the district court's order, was handed down on July 30, 2008. A timely petition for rehearing was denied on August 26, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. §1981

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of

> contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

28 U.S.C. § 1658

> Time limitations on the commencement of civil actions arising under Acts of Congress
>
> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [enacted Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues.

STATEMENT

This appeal involves the application of 28 U.S.C. § 1658(a) to claims of discriminatory denial of promotion brought under 42 U.S.C. §1981. Section 1658(a) provides a four-year statute of limitations for civil actions arising under federal statutes enacted after December 1, 1990. The Appellant, James Fonteneaux ("Fonteneaux"), was employed with the Defendant for more than 28 years and during his employment he performed several managerial and supervisory positions. In July 2003, Fonteneaux was discriminatorily denied promotions to two manager positions. On November 23, 2005, Fonteneaux filed suit

against the Defendant for discriminatory denial of promotion under 42 U.S.C. §1981. Fonteneaux alleged that the four-year statute of limitations under Section 1658(a) applied to the discriminatory denial of promotion claims he brought under 42 U.S.C. §1981. The district court held that Fonteneaux's discriminatory denial of promotion claims brought under 42 U.S.C. §1981 were time-barred under the two-year Texas statute of limitations. On appeal, the Fifth Circuit upheld the decision of the district court.

This Petition seeks to have the Court review the rights of claimants who bring denial of promotion claims brought under 42 U.S.C. §1981 to have the federal four-year statute of limitations under 28 U.S.C. § 1658(a) to consistently apply to their claims.

REASONS FOR GRANTING THE PETITION

The question presented for review is whether a Plaintiff's cause of action for denial of promotion which allege violations of 42 U.S.C. §1981, as amended by the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071, should be exclusively governed by the four-year statute of limitations under 28 U.S.C. § 1658(a).

Like many federal statutes, 42 U.S.C. §1981 does not contain a statute of limitations. *See Jones v. R.R. Donnelley*, 541 U.S. 369, 371 (2004). Congress enacted 28 U.S.C. § 1658(a) to alleviate the practice of borrowing state statutes of limitations which forced federal courts to address the "frequently present problem of a conflict of laws in determining which State statute [was] controlling, the law of the forum or that of

the situs of the injury." *See Jones*, 541 U.S. at 378-79.[1] Federal courts were forced to grapple with questions such as whether federal or state law governed when an action was "commenced," or when service of process had to be effectuated and the absence of a uniform federal limitations period complicated the development of federal law on the question when, or under what circumstances, a statute of limitations could be tolled. *See id.* Even when federal courts were able to identify the appropriate state statute, limitations borrowing resulted in uncertainty for both plaintiffs and defendants, as a plaintiff alleging a federal claim in State A would find herself barred by the local statute of limitations while a plaintiff raising precisely the same claim in State B would be permitted to proceed. *See id.*

In *Jones*, the Supreme Court ultimately concluded that a cause of action "aris[es] under an Act of Congress enacted" after December 1, 1990-and therefore is governed by Section 1658's 4-year statute of limitations-if the plaintiff's claim against the defendant was made possible by a post-1990 enactment. *See Jones*, 541 U.S. at 382. The Supreme Court reasoned that this construction best serves Congress' interest in alleviating the uncertainty inherent in the

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[1] The Supreme Court had previously held in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 107 S.Ct. 2617 (1987), that federal courts should apply "the most appropriate or analogous state statute of limitations" to claims based on asserted violations of Section 1981. *See Jones*, 541 U.S. at 371. Three years after the Supreme Court's decision in *Goodman*, Congress enacted a catchall 4-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. 28 U.S.C. § 1658(a). *See Jones*, 541 U.S. at 371.

practice of borrowing state statutes of limitations while at the same time protecting settled interests. It spares federal judges and litigants the need to identify the appropriate state statute of limitations to apply to new claims but leaves in place the "borrowed" limitations periods for pre-existing causes of action, with respect to which the difficult work already has been done. *See id.*

In *Patterson,* the Court held that 42 U.S.C. §1981 did not apply to an employer's conduct after the formation of an employment relationship. *See Patterson v. McLean Credit Union,* 491 U.S. 164, 176-77 (1989). The Court specifically held that "the relevant provision in §1981 protects two rights:

> 'the same right . . . to make . . . contracts' and 'the same right . . . to . . . enforce contracts.' The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII."

See id. The Court's precise holding in *Patterson* was clear that only claims regarding the formation or enforcement of an employment contract were viable under §1981; thus, claims of denial of promotion were not viable because such claims did not involve the formation or enforcement of an employment contract.

Although the respondent in *Patterson* did not argue at any stage that the petitioner's promotion claim was not cognizable under §1981, the Court stated (in dicta) that

> "the question whether a promotion claim is actionable under §1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under §1981. In making this determination, a lower court should give a fair and natural reading to the statutory phrase "the same right . . . to make . . . contracts," and should not strain in an undue manner the language of §1981. Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under §1981."

Patterson, 491 U.S. at 185.[2]

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[2] Because the respondent in *Patterson* did not argue at any stage that the petitioner's promotion claim was not cognizable under §1981, the Court did not address the issue further. *See Patterson* at 186. Because the precise issue of whether a denial of promotion claim was viable under §1981was presented to the Court for

In *Patterson*, the petitioner's promotion claim was not brought before the Court; thus, the language regarding the petitioner's promotion claim was not a part of the Court's holding in the case. However, based on the language in *Patterson* which addressed the petitioner's promotion claim, federal courts are now indulging in the practice of making factual determination regarding when a promotion does or does not rise to the level of an opportunity for a new and distinct relation between the employee and the employer in deciding whether the federal or state statute of limitations applies to a claimant's denial of promotion claim under 42 U.S.C. §1981. It was not Congress' intent when it enacted 28 U.S.C. § 1658(a) that federal courts indulge in making factual determinations regarding whether the federal or state statute of limitations applies to claims brought under 42 U.S.C. §1981. Congress' intent was to alleviate federal courts from grappling with questions such as whether federal or state law governed when an action was commenced. *See Jones*, 541 U.S. at 378-79.

A consistent application of the four-year statute of limitation under 28 U.S.C. § 1658(a) to all denial of promotion claims brought under 42 U.S.C. §1981 would be what Congress intended when it enacted the statute to alleviate federal courts from making factual determinations regarding questions such as whether federal or state law governed when an action was commenced. A consistent application of the statute would also prevent inconsistent and erroneous results made by federal courts analyzing whether or not

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review, any analysis the Court provided on this issue was only dicta.

promotion claims under §1981 are time-barred by a federal or state statute.

In the present case, even in light of the fact that Fonteneaux had held numerous management and supervisory positions with this same employer throughout his more than 28 years of employment, the lower court made a factual determination that Fonteneaux's requested promotion would have created a new and distinct relationship between him and the employer because the new position would have included supervisory duties and his present position included management but not supervisory duties. Based on its erroneous factual determination, the lower court applied the two-year Texas statute of limitations and ruled that Fonteneaux's promotion claim under §1981 is time-barred. This is not the result that Congress intended when it enacted 28 U.S.C. § 1658(a). Furthermore, based on the precise holding in *Patterson*, Fonteneaux's promotion claim was not viable under §1981 prior to the enactment of the Civil Rights Act of 1991. Thus, the four-year statute of limitations under 28 U.S.C. § 1658(a) applied to Fonteneaux's promotion claims brought under §1981. *See Jones*, 541 U.S. at 382. Therefore, the lower court deprived Fonteneaux of his right to litigate his claims of denial of promotion that were brought under 42 U.S.C. §1981.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari

to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 08-20037 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES FONTENEAUX,
Plaintiff - Appellant
v.
SHELL OIL CO; SHELL INFORMATION TECHNOLOGY INTERNATIONAL INC,
Defendants – Appellees

July 30, 2008, Filed

Appeal from the United States District Court for the Southern District of Texas. 4:05-CV-4033.

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before STEWART, OWEN, and SOUTHWICK, Circuit Judges.

OPINION

PER CURIAM: *

James Fonteneaux filed suit against Shell Oil Co. and Shell Information Technology International Inc. alleging race and age discrimination. The district court granted the Defendants' motion for summary judgment.

On appeal, Fonteneaux argues that there were factual issues and legal errors that require reversal. We disagree and affirm.

I. BACKGROUND

We will refer to the Defendants collectively as "Shell." Fonteneaux was employed at Shell from May 1976 through February 2005, where he progressed through various positions. Throughout the 1990s, Fonteneaux worked with Shell's information technology systems. In 1998, Shell began implementing a new global information technology services strategy which remained in a state of change until 2003. It is during this transitional period that Fonteneaux believed he was more qualified to fill certain positions than the persons selected. In September 2001, Jay Crotts was selected as the interim manager of Shell's Strategic Relations & Procurement ("SR&P") division. In 2002, Fonteneaux began working under Crotts as an interim Strategic Relations Manager ("SRM"), a position in the SR&P division.

In July 2003, Shell hired Kristine Moore as the SR&P division's permanent manager. After Moore became the SR&P division manager, she reevaluated positions as part of a reorganization. The decision was made to replace all of the SRM positions with Strategic Relations Account Manager ("SRAM") positions. The new positions required 10-15 years of external sales experience, i.e., with vendors outside of Shell itself. None of the fourteen Shell employees who applied for the new positions, including current SRMs, had the required sales experience.

All except one of the SRAM positions were filled from outside of Shell. The exception was a position filled by a citizen of the United Kingdom. That country's employment law was interpreted to entitle the employee to a transfer. The remaining Shell employees were provided a list of Shell position vacancies and offered a severance package. All of the other internal Shell candidates for the new SRAM positions were notified of their non-selection in September 2004. Fonteneaux did not obtain another Shell position, refused a severance package, and his employment was terminated at the end of February 2005.

Fonteneaux filed his charge of discrimination with the Equal Employment Opportunity Commission on March 14, 2005. Fonteneaux made no specific allegations in his charge. The EEOC issued a right to sue letter, and suit was filed on November 30, 2005. The district court on August 22, 2007, granted Shell's motion for summary judgment on all claims. In a supplemental order dated December 14, 2007, the court addressed claims under 42 U.S.C. Section 1981 and denied them as well. Fonteneaux appeals.

II. DISCUSSION

In our review of the district court's grant of summary judgment, we apply the same analysis as did that court, examining the facts and inferences in the light most favorable to the party opposing judgment. *Armstrong v. American Home Shield Corp.*, 333 F.3d 566, 568 (5th Cir. 2003).

Fonteneaux argues that there were fact issues that should have prevented summary judgment. He

organizes his brief by sections that address five specific claims that were denied, and then a sixth section dealing with the limited acceptance of his affidavit. We will follow that organization except that the validity of the affidavit will be discussed where relevant as to specific claims.

1. New SRAM positions

Fonteneaux is an African-American, a member of a protected class, who was not selected for the new SRAM position, and the positions were filled by persons outside of his protected class. The district court found that those facts satisfied three of the four factors for a *prima facie* case of discrimination, but that there was no evidence that Fonteneaux was qualified for the position. *See Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001). The qualification for the new SRAM positions that he did not meet, nor did any other of the occupants of the SRM positions at Shell, was 10-15 years of sales experience.

Fonteneaux argues that the shorter-term sales experience he did have, taken with evidence that Shell's human resource office thought that the new SRAM position was not more than 30% different than the SRM position, reveal that he was actually qualified for the new position. This argument is a challenge to Shell's decision setting the minimum qualifications for the position. Substantial weight is given to an employer's decision on necessary credentials; there was no evidence sufficient to block summary judgment that the sales experience requirement had a discriminatory purpose. *See Deines v. Texas Dep't of Protective and Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999).

Shell justified the requirement of lengthy sales experience external to Shell on the fact that the new SRAM positions would have an enhanced role in the company compared to the older SRM position. Fonteneaux had no such experience. Any sales experience Fonteneaux acquired was from within the Shell entity.

There is no material fact in dispute on this point. The only SRM who gained a new SRAM position was the citizen of the United Kingdom, and all lacked the required experience established by Shell. Fonteneaux did not demonstrate a *prima facie* case of discrimination in not being selected for one of the new SRAM positions.

2. Retaliation

Fonteneaux argues that he demonstrated a *prima facie* case of retaliation because his old SRM position was terminated within five months from the date he complained of discrimination for not being selected for a new SRAM position.

To establish a *prima facie* case of retaliation, Fonteneaux must establish the following: "(1) he participated in an activity protected by Title VII; (2) his employer took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse employment action." *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007).

Based on Fonteneaux's allegations, he was informed that his SRM position, along with the others, would be

replaced with new SRAM positions which required advanced sales experience. It was only after receiving this information and being notified that none of the current SRM's, with the exception of the U.K. citizen, were eligible to transfer into a new SRAM position, that Fonteneaux complained of discrimination.

The protected activity Fonteneaux complains of took place after the decision to terminate his SRM position was already made. A September 2004 meeting in which he complained about discrimination occurred after Fonteneaux was not selected for a new SRAM position; the complaint could not have caused the non-selection. There are no facts alleged that create a basis for a retaliation claim. Summary judgment was proper.

3. Statute of limitations for claims relating to SR&P division positions

Fonteneaux argues that he was the most qualified person for the interim manager and permanent manager of the SR&P division. Fonteneaux included a claim of discriminatory failure to promote under 42 U.S.C. § 1981. The proper statute of limitations for a claim under that statute is determined by whether the claim would have been viable before certain 1991 congressional enactments.

Fonteneaux concludes that the district court improperly applied Texas's two-year statute of limitations instead of a four-year federal limitations period. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 2002) (two-year statute of limitations); 28 U.S.C. § 1658(a) (four-year statute of limitations for "a

civil action arising under an Act of Congress enacted" after December 1, 1990").[1]

Because Section 1981 does not contain a statute of limitations, traditionally the most analogous state statute of limitations has been applied. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004). After enactment of the 1991 Civil Rights Bill by Congress, a four-year statute of limitations applies "if the plaintiff's claim against the defendant was made possible" by the 1991 or later statute. *Id.* at 382.

Fonteneaux's claim of failure to promote based on alleged racial discrimination would have been actionable without the 1991 statutory changes if "the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981." *Patterson v. McLean Credit Union*, 491 U.S. 164, 185, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) *superseded by statute on other grounds as stated in CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008).

The 1991 amendment to Section 1981 was in response to the holding in Patterson that claims of post-contract-formation racial discrimination in retaliation for engaging in protected activity were not actionable under Section 1981. *Humphries*, 128 S. Ct. at 1956-58. The *Patterson* holding, excluding post-contract-formation conduct from Section 1981's scope, is what gave rise to the 1991 amendment. *Id.* at 1956. Discriminatory refusal to enter into a new employment

contract was actionable under Section 1981, as the language we quoted from *Patterson* reveals.

"In deciding whether a change of position rises to the level of a new and distinct relation, the court must compare the employee's current duties, salary, and benefits with those incident to the new position." *Police Ass'n ex rel. Cannatella v. City of New Orleans*, 100 F.3d 1159, 1170-71 (5th Cir. 1996). Shell argues that Fonteneaux, if promoted, would have attained supervisory status over SR&P division employees. Where a routine promotion involves the attainment of supervisory status, that alone does not create a new and distinct employment relationship. *Johnson v. Uncle Ben's*, 965 F.2d 1363, 1371 (5th Cir. 1992). However, a non-routine promotion that involves the attainment of supervisory status may be categorized as creating a new and distinct employment relationship. *See Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990). There is no evidence that Fonteneaux had any supervisory capacity in his SRM position. The promotions which he sought involved the ability to make employment decisions as a Shell manager. A promotion that would allow an employee to hire and fire subordinates is the type of relationship that creates a new and distinct employment relationship.

Therefore, the two-year Texas statute of limitations applied. Fonteneaux was aware of his not being promoted no later than July 2003 for the permanent position and much earlier for the interim manager position. He did not file suit until November 2005. These claims are therefore barred.

4. Disparity in pay

Fonteneaux argues that he provided sufficient evidence to survive summary judgment on his disparate pay claim. He alleged that his white coworkers in the old SRM positions received higher compensation. In support of this allegation, Fonteneaux offered his affidavit and a document that purportedly contained salary information of his coworkers from 2003-2005. The district court ruled that this evidence was not competent. The salary table did not include all of Fonteneaux's coworkers, and did not indicate its source.

Evidence that would not be admissible at trial is not competent evidence to be considered during summary judgment. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (1991). Affidavits certainly may be sufficient evidence, but "unsubstantiated assertions are not competent summary judgment evidence." *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). On its face, Fonteneaux's affidavit is comprised of mere allegations and hearsay. The district court properly concluded that the pay table document and Fonteneaux's affidavit are not proper summary judgment evidence. Summary judgment was proper on the disparity in pay claim.

5. Category Manager of IT-Hardware and IT-Software positions

Fonteneaux argues that the district court failed to consider his claims of race and age discrimination based on not being selected for two separate positions as Category Manager. He argues that, despite his being

qualified for each position, the positions were filled with white females under the age of forty.

The district court held that Fonteneaux failed to state any specific facts regarding discrimination in not being selected for these Category Manager positions. As discovery progressed in this case, Fonteneaux did not seek any information pertinent to the Category Manager positions.

Fonteneaux concedes that this issue was first raised in his response to Shell's motion for summary judgment. Fonteneaux provided no facts or details to Shell on these claims even after Shell filed a motion for a more definite statement. Fonteneaux, in his district court filings, provided no dates in relation to the Category Manager positions. On appeal, Fonteneaux does not provide any specific date or factual description of alleged discrimination regarding these positions. The district court properly concluded that Fonteneaux did not prosecute these claims. To the extent these claims were raised, summary judgment was proper.

The judgment of the district court is AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1We note that alternatively, Fonteneaux argues even if the federal limitations period does not apply, Texas applies a four-year statute of limitations for contractual

matters and Section 1981 allows a cause of action based on a contractual relationship. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a). However, this Circuit has recognized that claims of racial discrimination are subject to Texas's two-year statute of limitations. *Jones v. ALCOA, Inc.*, 339 F.3d 359, 368 (2003).

CIVIL ACTION NO. H-05-4033
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF TEXAS, HOUSTON DIVISION

JAMES FONTENEAUX,
Plaintiff,

v.

SHELL OIL COMPANY and SHELL
INFORMATION TECHNOLOGY
INTERNATIONAL, INC.,
Defendants.

August 22, 2007, Decided
August 22, 2007, Filed

JUDGES: KEITH P. ELLISON, UNITED STATES DISTRICT JUDGE.

OPINION MEMORANDUM AND ORDER

Pending before the Court is Defendants' Motion for Summary Judgment (Doc. No. 37). For the reasons set forth below, Defendants' motion is **GRANTED.**[1]

I. BACKGROUND

James Fonteneaux is an African American male and is fifty-five years old. He began working for Shell ail Company ("Shell") in 1976. Throughout his employment at Shell, he held numerous procurement positions in various Shell businesses.

In July 2001, Shell's information technology ("IT") organization was restructured and became Shell Information Technology International, Inc. ("SITI"). Also in 2001, Shell hired Mike Rose as the Chief Information Officer ("CIO"), and he was responsible for creating a single IT community out of SITI and Shell's various business units.

Rose implemented a new business function that he called "strategic relations," which he sought to combine with the procurement function within SITI. He called this new function "Strategic Relations and Procurement" ("SR&P"), and the plan was to reinvent procurement by "bringing in real expertise with sales experience to sit across the table from salespeople from the IT industry selling into [Shell]." (Def.'s Mot. Summ. J. Ex. B at 58, ll. 11-15.) According to Rose's vision, a SR&P professional must have experience in outside sales, because only then would he or she understand the strategies used by the outside salesperson attempting to sell to Shell's procurement division.

Rose began implementing his SR&P plan by recruiting Jay Crotts to act as interim leader of the new SR&P department. Crotts had experience in procurement, but not outside sales, so Rose instructed Crotts to focus on the procurement aspects of the SR&P department during his tenure. Meanwhile, Crotts recruited an interim team of Strategic Relations Managers ("SRMs") to begin developing the new strategic relations function. Fonteneaux was assigned to a SRM position in June 2002.

Because Crotts did not have the outside sales experience that Rose believed was necessary to

manage the SR&P department, Rose conducted an external search for a permanent manager. The initial search was unsuccessful, but Rose later offered the permanent position to Kristine Moore, a current Shell employee who had previously worked for IBM in outside sales. Moore was made Manager Strategic Relations & Procurement on July 1, 2003.

Moore was tasked with improving the strategic relations function of the SR&P department. In doing so, she decided to eliminate the interim SRM role and create a new position called Strategic Relations Account Manager ("SRAM"). The SRAM position had all of same duties and responsibilities as the SRM position, but also had additional duties that the SRM position did not. Moore and Rose maintained that extensive outside sales experience, particularly experience making sales for a large external supplier to another large company, was a mandatory requirement for the SRAM position.

In the latter half of 2003, Moore began notifying her SRM team that the strategic relations role would be changing. She advised the SRMs that their position was going to be eliminated and that they should apply for other jobs within Shell. Eventually, a voluntary severance package was offered to all employees of SITI, including the SRMs.

Moore then began an informal search to fill the new SRAM roles, identifying two external candidates: Ann Perrin and Jane Dancer. Perrin's work experience included fourteen years with IBM in sales and marketing roles, four years with BMC Software, and three years in development of strategic account

management systems with Critical Path Strategies, Inc. Dancer's work experience included twelve years of outside sales and strategic relations management with Cable & Wireless. Perrin was hired for a SRAM position in the United States, and Dancer, who lived in the United Kingdom, was hired for a SRAM position in the UK. In addition, Steve Hamil, a citizen of the UK, moved from a SRM position to the new SRAM position in the UK in accordance with UK law. [2]

The remaining new SRAM positions were then posted on Shell's internal job-posting system in August 2004. The posting indicated that "10-15 years of IT consultative selling and account management experience" was necessary qualification for the job. (Def.'s Mot. Summ. J. Ex. I at EBG(045)-5728.) Fonteneaux applied for a SRAM position. On August 24, 2004, the posting was closed and the applications were forwarded to Moore. She determined that none of the internal candidates was qualified for the position. Fonteneaux was notified on September 21, 2004, that he was not chosen for the SRAM role. He was also told that his SRM position would end in October 2004, but that he would remain on the payroll until December 31, 2004, at which time his employment with Shell would end if he had not acquired another position.

Shortly thereafter, Fonteneaux complained about his failure to be selected for a SRAM role and other matters. He utilized Shell's voluntary dispute resolution program, and while pursuing mediation through this program, his employment was extended for an additional two months by allowing him to exhaust his vacation entitlements. During this time, Fonteneaux failed to secure another position within

Shell, so his employment was terminated on February 28, 2005.

Meanwhile, in order to fill the remaining SRAM positions, Moore utilized a search firm to conduct an external search, primarily in Europe. Over the next eighteen months, Moore hired three new SRAMs: Gregg Parsley from the United States, and Marietta Antvelink and Boris Van Der Weele from the Netherlands. Parsley worked for IBM in exclusively sales roles for more than sixteen years. Antvelink worked for more than ten years at Gartner Research, selling and training in strategies of enterprise selling. Van Der Weele had more than ten years of experience in sales, having most recently worked for Microsoft selling to Philips Electronics.

Fonteneaux has since filed suit against Shell Oil and SITI, alleging race and age discrimination, retaliation, and harassment. Defendants seek summary judgment on all of Fonteneaux's claims.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. *See* Fed. R. Civ. P. 56(c). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.

Ed. 2d 265 (1986) (internal quotation marks omitted). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could enter a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). This Court must view all evidence in the light most favorable to the non-moving parry and draw all reasonable inferences in that party's favor. *Id.* at 255.

III. RACE DISCRIMINATION

"Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin." *Grimes v. Texas Dep't of Mental Health*, 102 F.3d 137, 140 (5th Cir. 1996). Title VII claims are subject to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the plaintiff must establish a *prima facie* case of discrimination. *Id.* at 802. Then, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Finally, the burden shifts back to the plaintiff to produce evidence that (1) the defendant's articulated reason is not true, but rather pretext for discrimination ("pretext alternative"), or (2) the defendant's articulated reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic ("mixed motive alternative"). *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

To establish a *prima facie* case of discrimination, a plaintiff must provide evidence that he (1) is a member of a protected class; (2) was qualified for his position; (3)

was subject to an adverse employment action; and (4) was replaced by someone outside the protected class. *Okoye v. Univ. of Texas Houston*, 245 F.3d 507, 512-13 (5th Cir. 2001).

In this case, Fonteneaux can unquestionably establish elements (1), (3), and (4) of his *prima facie* case. As an African American, he is a member of a protected class; he was subjected to an adverse employment action when he was not hired for or promoted to the SRAM position;[3] and those who were hired for the SRAM positions were White. However, Defendants maintain that Plaintiff cannot establish that he was qualified for the SRAM position, and thus has failed to make out a *prima facie* case of race discrimination.

The SRAM posting on Shell's internal job-listing system indicated that "10-15 years of IT consultative selling and account management experience" was necessary qualification for the job. (Def.'s Mot. Summ. J. Ex. I at EBG(045)-5728.) While Plaintiff's application for the SRAM position demonstrates that he had a great deal of valuable procurement experience, it does not appear to indicate that he had any sales experience. (Def.'s Mot. Summ. J. Ex. S.) Plaintiff argues in his Response that, from 1998 to 2001, he worked for a division in Shell (Shell Services International, or "SSI") that sold IT services externally. Even so, those three years of sales experience are far fewer than the 10-15 years of experience required for the job. Thus, based on the information contained in the application provided to Defendants, they were entitled to conclude that Plaintiff was not qualified for the SRAM position.

Plaintiff attempts to raise a question of fact regarding

his qualifications by asserting in his affidavit that he had extensive sales and consulting experience and was more qualified than those who were selected for SRAM positions. However, this statement is not supported by any evidence, and unsupported affidavits setting forth conclusory facts are insufficient to defeat a motion for summary judgment. *Galindo v. Precision Amer. Corp.*, 754 F.2d 1212, 1215 (5th Cir. 1985).

Plaintiff also argues that the SRM and SRAM positions were identical, so outside sales experience was not in fact a "real" requirement for the job. He maintains that the job duties did not change, and because he was qualified for the SRM position, he was therefore also qualified for the identical SRAM position. However, the job posting for the SRAM position listed on its face a requirement of ten to fifteen years of consultative sales experience. If a company decides to impose additional qualifications for a particular position, it is not for a court to determine whether those additional qualifications are in fact necessary for the job, unless there is some evidence that they were imposed merely to discriminate. Here, there is no such evidence. The increased qualifications were imposed on all of the White SRMs as well as Plaintiff, and all of the White SRMs were found to be unqualified, just like Plaintiff. Thus, the allegation that the SRAM position may not in fact have required the use of outside sales experience on a daily basis does not create a question of fact regarding Plaintiff's qualifications for the job. The fact remains that he did not meet the qualifications listed in the job posting, Plaintiff has produced no evidence that the qualifications were imposed in order to discriminate, and so Plaintiff has failed to establish a *prima facie* case of discrimination. Consequently,

Defendants' motion for summary judgment on Plaintiff's race discrimination claim must be granted.

In addition to his failure to receive the SRAM position, Plaintiff argues in his Response to Defendants' summary judgment motion that there were several other promotions that he was denied because of his race throughout his employment with Shell. Specifically, he claims that he was denied a promotion to Category Manager of IT Software, to Category Manager of IT Hardware, to the position of Manager SR&P that was filled by Crotts, and to the position of Manager SR&P that was filled by Moore. In addition, Plaintiff argues that he was denied a promotion in pay grade by a former supervisor, Jim Niekirk, because of his race, and that he was discriminated against in compensation because of his race. None of these claims, however, was administratively exhausted.

First, Plaintiff failed to timely challenge many of these actions. Before bringing a lawsuit for discrimination under Title VII, a plaintiff is required to file a charge of discrimination with the EEOC. That charge must be filed within 300 days of the discriminatory act. 29 C.F.R. § 1601.13(a). In this case, Plaintiff filed a charge of discrimination with the EEOC on March 14, 2005. However, Plaintiff learned that he was not hired for the first Manager SR&P position when Crotts was hired no later than 2002, and that he was not hired for the second Manager SR&P position when Moore was hired in 2003. In both instances, more than 300 days passed before Plaintiff filed his EEOC charge, and thus he failed to timely exhaust his administrative remedies with regard to these allegations.[4] Similarly, Niekirk's alleged refusal to promote Plaintiff in pay grade

occurred in 1997, well beyond the 300-day look-back period from the date Plaintiff filed his charge. This claim, therefore, was also not timely exhausted. Finally, Plaintiff's allegations that he was discriminated against in compensation must also be barred for failure to timely exhaust administrative remedies. The Supreme Court has recently held that because a pay-setting decision is a "discrete act," the period for filing an EEOC charge begins when the act occurs. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165, 167 L. Ed. 2d 982 (2007). Plaintiff's most recent complaints of pay discrimination relate to his pay at his SRM position, which he began in 2002, and his pay was thus set at that time--more than 300 days before his EEOC charge was filed. Thus, his pay discrimination claims are likewise barred for failure to timely exhaust administrative remedies.

In addition to the fact that these claims were not timely filed, these claims of discrimination also exceed the scope of the EEOC charge. A plaintiff is not required to assert all of his legal theories in an EEOC charge, but he is required to assert the facts that form the basis for his legal claims. *Harris v. Parker College of Chiropractic*, 286 F.3d 790, 795 (5th Cir. 2002). In his EEOC charge, Plaintiff stated only:

1. I have been subjected to discrimination and harassment because of my age, and sex, which similarly situated younger employees and other employees were not treated in the same way.

2. I have been subjected to discrimination and harassment because of my race, age, and sex.

> I also believe that I was retaliated against for complaining about this disparate treatment and other system abnormalities.

(Def.'s Reply Mot. Summ. J. Ex. C.) Defendants responded to this charge with explanations for Plaintiff's failure to receive a SRAM position and his termination from the company. Because of the very general allegations contained in the charge, the Court is persuaded that Defendants could not have been on notice that Plaintiff intended to challenge four other denied promotions, a denial of a pay grade increase, and allegedly discriminatory compensation. Defendants' response to the EEOC charge indicates that they were not in fact on notice of these claims. (Def.'s Reply Mot. Summ. J. Ex. D.) Thus, all of these additional claims must also be barred because they exceed the scope of the EEOC charge.

IV. AGE DISCRIMINATION

Similar to Title VII, the ADEA prohibits employment discrimination based on age. The burden-shifting framework of *McDonnell Douglas* applies to ADEA claims as well. *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004). Thus, Plaintiff must establish a *prima facie* case of age discrimination by showing that (1) he is over the age of forty, (2) he was qualified for the position, (3) he was not selected for the position, and (4) the position was filled by someone outside the protected class. *Reeves v. Gen. Foods Corp.*, 682 F.2d 515, 520 n.7 (5th Cir. 1982).

Defendants contend that Plaintiff has failed to establish a *prima facie* case of age discrimination because, once

again, he cannot show that he was qualified for the position. For the reasons explained above, the Court agrees. Plaintiff's application for the SRAM position did not meet the qualification requirements listed on the face of the job posting, so Plaintiff cannot establish a *prima facie* case of age discrimination.

In addition, Defendants contend that Plaintiff cannot establish the fourth prong of the *prima facie* case, which requires that the position be filled by someone outside the protected class. In this case, none of the individuals selected for the SRAM positions was under the age of forty. However, the Supreme Court has indicated that, in the age discrimination context, a showing that a worker was replaced by one substantially younger will suffice to establish a *prima facie case. O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996). Many courts interpreting the Supreme Court's decision have held that age differences of ten years or less are not significant enough to make out the fourth prong of a plaintiff's *prima facie* case. *See, e.g., Balderston v. Fairbanks Morse Engine Div.*, 328 F.3d 309, 322 (7th Cir. 2003) (remarking that "substantially younger" generally means ten years younger); *Grosjean v. First Energy Corp.*, 349 F.3d 332, 336 (6th Cir. 2043), *cert. denied*, 541 U.S. 1010, 124 S. Ct. 2069, 158 L. Ed. 2d 620 (2004) (difference of six years not significant, in the absence of direct evidence of discrimination); *Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000) ("three year age difference is too insignificant to support a prima facie case of age discrimination"); *Hartley v. Wisc. Bell*, 124 F.3d 887, 892 (7th Cir. 1997) (age difference of six or seven years "presumptively insubstantial"); *Schiltz v. Burlington N.*

R.R., 115 F.3d 1407, 1413 (8th Cir. 1997) (five year age difference not "substantial" and does not raise inference of discrimination).

In this case, only one SRAM was more than three years younger than Plaintiff: Greg Parsley, who was eight years younger than Plaintiff. Because none of the individuals hired as SRAMs were "substantially younger" than Plaintiff as that term has been interpreted by the federal courts, Plaintiff also fails to establish the fourth prong of his *prima facie* case of age discrimination. Thus, Defendants' motion for summary judgment on Plaintiff's age discrimination claim must be granted.

V. RETALIATION

Plaintiff has also alleged that Defendants retaliated against him for complaining about discrimination. Title VII makes it "an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a), Title VII retaliation claims are also subject to the now familiar burden-shifting framework established in *McDonnell Douglas*. 411 U.S. at 802.

In order to establish a *prima facie* case of retaliation, a plaintiff must prove "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action." *Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996). The Supreme Court has

recently held that the anti-retaliation provision of Title VII is broader than the anti-discrimination provision and, accordingly, that a retaliation claim may arise from any action that a reasonable employee would find materially adverse, "which[,] in this context[,] means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (June 22, 2006) (internal quotation marks omitted).

While it is clear in this case that Plaintiff suffered an adverse employment action, Defendants argue that Plaintiff has not engaged in "protected activity" sufficient to support a retaliation claim, "Protected activity" includes opposing an employment practice that is unlawful under Title VII, making a charge of discrimination, or testifying, assisting, or participating in an investigation or proceeding under Title VII. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001). Plaintiff appears to argue that his protected activity consisted of opposing unlawful employment practices. He contends that, in 1997, he complained to HR after his supervisor, Niekirk, awarded a grade level and corresponding salary increase to all individuals in his equivalent leadership position, but did not award the same to Plaintiff. In addition, Plaintiff asserts in his affidavit that he complained throughout his employment of racial harassment and racial slurs. While Plaintiff provides very few details regarding these alleged complaints, the Court is willing to conclude that Plaintiff engaged in protected activity sufficient to support a retaliation claim.

However, the Court is not persuaded that Plaintiff has established the third prong of the *prima facie* case, which requires him to demonstrate that a causal link existed between the protected activity and the adverse employment action. In order to establish this causal link, "the evidence must show that the employer's decision to terminate was based in part on knowledge of the employee's protected activity." *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). A plaintiff may establish causation by either direct or circumstantial evidence. *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 191-92 (5th Cir. 2001). "Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required to make out a *prima facie* case of retaliation." *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997).

In this case, there was not close timing between Plaintiff's complaints and the adverse action taken against him. The only complaint for which Plaintiff has provided a date is his 1997 complaint to HR about allegedly discriminatory pay. However, the only adverse employment action that Plaintiff has administratively exhausted, and thus the only action that he can challenge in this Court, is his failure to receive the SRAM position, which occurred in 2004. This significant expanse of time between complaint and adverse action fails to support an inference of a "causal connection."

In addition, Plaintiff has not provided any details about his alleged complaints of racial harassment or racial slurs. There is no evidence of when the alleged complaints were made, nor to whom they were made.

Thus, the Court cannot conclude that the complaints were made so closely in time to the adverse employment action that a "causal connection" can be inferred.

Finally, because Plaintiff cannot show that the adverse action occurred closely in time to his protected activity, he must show that Defendants' decision not to give him a SRAM position was based in part on knowledge of his protected activity. The decision not to give Plaintiff a SRAM position was made by Moore, but Plaintiff has produced no evidence whatsoever that Moore was aware of any complaints of racial discrimination that Plaintiff made to HR. Plaintiff attempts to attribute knowledge to Moore by alleging that Moore was retaliating against him because he tried to get Moore removed from Shell's IBM account when Moore worked for IBM. Even if this were true, trying to get Moore off of the account would not constitute "protected activity" under Title VII unless Plaintiff could show that he did so because he thought Moore was engaging in activity that violated Title VII. Plaintiff has produced no evidence to this effect. He has shown only that there were protected complaints of which Moore was unaware, and that there were unprotected complaints of which Moore may have been aware. On such a record, the Court must conclude that Plaintiff has failed to show the requisite causal link between his protected activity and the adverse employment action. Because Plaintiff has failed to establish a *prima facie* case of retaliation, Defendant's motion for summary judgment on the retaliation claim must be granted.

VI. HARASSMENT

Finally, Plaintiff alleges that he was subject to unlawful racial harassment. A *prima facie* case of racial harassment alleging a hostile work environment normally requires the plaintiff to establish five elements: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Watts v. Kroger Co.*, 170 F.3d 505, 509-10 (5th Cir. 1999). However, where the harassment is allegedly committed by a supervisor with immediate (or higher) authority over the victim, the plaintiff needs to satisfy only the first four of these elements. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Once the plaintiff makes the four-part showing that he has been harassed by a supervisor, the employer is subject to vicarious liability for the supervisor's conduct. *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 354 (5th Cir. 2401).

Plaintiff cites several examples of conduct that he contends constitutes racial harassment. First, he argues that, in 1997, when he sought a leadership position, his supervisor, Niekirk, told him that he would not get the assignment because he was African American. Then, when he eventually obtained the position, he argues that he was denied the same pay grade awarded to White employees in the same position. However, as explained above, Plaintiff's complaints regarding this 1997 incident involving Niekirk were not timely exhausted administratively, nor were they within the scope of the EEOC charge that Plaintiff filed in 2005.

Because Defendants were not put on notice that Plaintiff was complaining of this incident, Plaintiff is barred from raising it before this Court.

Plaintiff's second allegation of harassment is that four other individuals who held SRM positions--all White--were paid more than Plaintiff.. However, Plaintiff has provided no evidence to support this assertion. The exhibit to which Plaintiff refers in his Response was not attached to his brief. Thus, because the only evidence of this alleged harassment are Plaintiff's unsupported conclusions in his affidavit, this claim cannot stand.

Finally, Plaintiff maintains that he was harassed because Moore assisted all of the White SRMs in finding other employment within Shell, but refused to assist Plaintiff. Once again, Plaintiff has provided no evidence to support this assertion. He relies solely on unsupported conclusory statements in his affidavit. Furthermore, Defendants have presented some evidence to the contrary in the form of an e-mail sent from Moore to Plaintiff, reminding him of the many jobs currently available within Shell and recommending several specific positions that might fit with Plaintiff's background and experience. (Def.'s Mot. Summ. J. Ex. R.) Thus, because all of the alleged instances of harassment against Plaintiff are barred or are unsupported by any admissible summary judgment evidence, Defendant's motion for summary judgment on Plaintiff's racial harassment claim must also be granted.

VII. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is **GRANTED** in its entirety. Plaintiff's claims are **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

SIGNED this 22nd day of August, 2007.

KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

Footnotes

1 Defendants have also filed Objections to Plaintiff's Evidence in Response to Motion for Summary Judgment (Doc. No. 41). Those objections and Plaintiff's responses to them have been considered by the Court where necessary, but will not be ruled on individually.

2 Rose and Moore did not believe that Hamil had the necessary outside sales experience to qualify for the SRAM role. However, Shell's UK human resources representatives advised Moore that UK law prohibited Shell from removing Hamil from his SRM role because the new SRAM position was not, in their opinion, more than 30% different from the SAM role. While Moore disagreed with this assessment, she followed the advice of the UK human resources department.

3 The parties disagree whether this is a failure-to-promote or failure-to-hire case. Plaintiff contends there was a failure to promote, while Defendants maintain this must be a failure to hire claim because the SRAM

role was an entirely new position. The Court does not believe the distinction is of significance to the legal analysis.

4 Plaintiff does not provide any dates surrounding his claims that he was not promoted to Category Manager of IT Software or Category Manager of IT Hardware. The Court presumes that these promotions were denied Plaintiff before he was appointed to the SRM position in June 2002, and thus would likely be barred for failure to timely exhaust administrative remedies as well. However, as explained below, these claims also exceed the scope of Plaintiff's EEOC charge and are barred on that ground.

No. 08-20037

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES FONTENEAUX,
Plaintiff - Appellant

v.

SHELL OIL CO; SHELL INFORMATION TECHNOLOGY INTERNATIONAL INC,
Defendants – Appellees

August 26, 2008

Appeal from the United States District Court for the Southern District of Texas. 4:05-CV-4033.

ON PETITION FOR REHEARING

Before STEWART, OWEN, and SOUTHWICK, Circuit Judges

PER CURIAM: IT IS ORDERED that the petition for rehearing is DENIED